No. 08-1117

In the Supreme Court of the United States

SCOTT DAVID BOWEN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION

JOHN R. KROGER
Attorney General of Oregon
MARY H. WILLIAMS
Deputy Attorney General
*JEROME LIDZ
Solicitor General
JANET A. METCALF
ANNA M. JOYCE
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Thirty-seven years ago this Court held, in an Oregon case, that non-unanimous, 11-1 and 10-2 jury verdicts in felony cases do not violate the Sixth Amendment. *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See also Johnson v. Louisiana*, 406 U.S. 356 (1972). Since then, Oregon has relied on *Apodaca* to administer Oregon's seventy-five-year-old constitutional provision that permits less-than-unanimous jury verdicts in felony cases other than murder, Or. Const. Art. I, section 11. The question presented is:

Whether this Court should overrule *Apodaca* and hold that the Sixth Amendment, as incorporated through the Fourteenth Amendment, requires jury verdicts in state court felony cases to be unanimous.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

STATEMENT OF THE CASE

A. Statement of the Facts

Because the issues in this case are legal ones, the facts can be stated briefly.

Petitioner was convicted of multiple sexual felonies against his stepdaughter. In his petition, he complains that the victim "was unable to pinpoint how old she was when any of the particular events she described allegedly occurred; she estimated the dates within two or three year periods." (Pet. Cert. 4). But that is not unusual with young victims of sexual abuse. Here, the victim was in first or second grade when some of the abuse occurred, but she was able to describe specific acts of abuse in detail and identify where in the family home they occurred. She described two acts of abuse, one involving oral sodomy, that took place in the defendant's bedroom; one that happened in her bedroom at night; one that occurred while she and petitioner were watching a movie and he touched her under a blanket; one that took place while she was taking a bath; and another that occurred in the garage. (Tr. 115-19, 120-23, 123-127, 129-34, 134-141, 142-45.) In all of those incidents, the victim was in the primary grades. (Tr. 117, 123, 134, 141, 146.) Two additional incidents occurred after the victim was older and in the seventh or eighth grade. One of those incidents formed the basis for a sodomy

charge and the other for a rape charge. (Tr. 158-60, 161-65.)

Petitioner notes that, when first contacted by the police, the victim "was a runaway." (Pet. Cert. 3.) Apparently, petitioner means to imply that the victim had a motive to accuse him falsely. By the time she testified at trial, however, the victim—who had started using methamphetamine and had dropped out of school in the eighth grade—was 18, in school at a community college, had completed drug and alcohol treatment, had been off drugs for a year and a half, and devoted time to speaking to other teens about recovery. (Tr. 169.)

B. Trial court proceedings

The state charged petitioner with five counts of first-degree sexual abuse, Or. Rev. Stat. § 163.427, two counts of first-degree sodomy, Or. Rev. Stat. § 163.405, and one count of first-degree rape, Or. Rev. Stat. § 163.375. (App. Br. 1, ER 1-2.) Petitioner requested that the jury be instructed that: "This being a criminal case, each and every juror must agree on your verdict." (Pet. Cert., App. 6a). In requesting the instruction, petitioner relied on *Blakely v. Washington*, 542 U.S. 296, 301 (2004), and specifically on the following sentence taken from that opinion:

> This rule [that, generally, any fact that increases the penalty for a crime

> beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt] reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) * * *.

(Emphasis added.)

The trial court refused to give the requested jury instruction because it would not "comply with Oregon law[.]" (Pet. Cert., App. 6a.) The trial court also concluded that *Blakely* was inapposite: "I don't think *Blakely* actually speaks to this. * * * It was addressing, of course, whether or not a jury should weigh in on factors that related to enhancements of sentencing. * * * I don't read this as a decision by the United States Supreme Court that every state must have * * * unanimous verdicts." (Pet. Cert., App. 6a-7a.)

The jury convicted petitioner of all the charges, but none of the verdicts was unanimous. Only ten jurors voted to convict on each charge. (Tr. 429-30.)

C. State appellate court proceedings

Petitioner appealed, contending, among other claims, that the trial court had erred in refusing to give his requested jury instruction. (App. Br. 11.) The state Court of Appeals rejected that claim. The court cited Article I, section 11, of the Oregon Constitution, which provides in part, that:

> in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by unanimous verdict, and not otherwise[.]

(Pet. Cert., App. 6a).

On appeal, as at trial, petitioner relied on *Blakely* to support his claim. He relied on the same sentence from *Blakely* that is quoted above. (Pet. Cert. App. 6a, (quoting *Blakely*, 542 U.S. at 301 (in turn quoting 4 William Blackstone, *Commentaries on the laws of England* 343 (1769)))). Relying on *Apodaca*, the Court of Appeals rejected his argument.

> Necessarily implicit in [petitioner's] argument is the premise that the Court's observation in *Blakely* had the effect of overruling *Apodaca v.*

> *Oregon*, 406 U.S. 404 (1972). In *Apodaca*, the Court held that the permissibility of less-than-unanimous jury verdicts under Article I, section 11, did not violate the Sixth Amendment to the United States Constitution. *Apodaca*, 406 U.S. at 407-14.

(Pet. Cert., App. 7a) (footnote omitted).

The state Supreme Court denied review without opinion. (Pet. Cert., App. 8a).

SUMMARY OF ARGUMENT

Petitioner asks this Court to revisit and overrule a decision it rendered thirty-seven years ago, even though this Court repeatedly has cited that decision and its conclusion without reservation, and Oregon has relied on that decision since 1972. Principles of *stare decisis* counsel that this Court should not reconsider *Apodaca* unless petitioner can make a persuasive showing that the Court's earlier decision is incorrect. Petitioner has not made that showing here. For that reason, this Court should do what it has done in other recent cases contending that the Sixth Amendment requires unanimous jury verdicts in state court criminal cases: deny the petition.[1]

---

[1] *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523); *Howard v. Oregon*, 129 S. Ct. 633 (2008) (No. 08-6449).

In arguing that *Apodaca* is wrong and that this Court should grant certiorari to overrule it, petitioner relies on this Court's recent quotations from Blackstone, who commented that the truth of every accusation against a criminal defendant should be confirmed by the unanimous suffrage of twelve of his equals and neighbors. Petitioner contends that *Apodaca* is "squarely inconsistent" with those recent decisions quoting Blackstone. But there is no inconsistency. The recent decisions dealt with other issues, and petitioner takes the quotations out of context.

History does not support overruling the interpretation of the Sixth Amendment that this Court adopted in *Apodaca*. As the Court recognized in that decision, the common law at the time of the Founding required a jury verdict to be unanimous. But it does not follow from that historical fact that a unanimous jury became a constitutional guarantee.

The Sixth Amendment does not explicitly include the right to a unanimous jury verdict, and this Court has held that other settled features of the common-law jury, including the requirement of a 12-person jury, are not included in the Sixth Amendment right to a jury trial. Indeed, the Sixth Amendment was adopted after the Congress rejected an earlier version of the amendment that specifically would have required unanimous verdicts. Although the reason for that

rejection is not clear, this Court has held that the more plausible explanation is that Congress intended that omission to have some substantive effect. Petitioner would give it none.

In addition, although the origins of the common-law rule requiring unanimous verdicts are unclear, all the possible rationales are outmoded. Adhering to them would be a matter of empty formalism. In short, history offers little support for petitioner's claim that the Sixth Amendment includes a right to unanimous jury verdicts in criminal cases in state court.

Finally, nothing in the empirical research on jury dynamics compels a conclusion that non-unanimous juries infringe on Sixth Amendment rights. Studies show little disparity in deliberation time between juries required to decide unanimously and those that do not deliberate under that requirement. To the extent there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict. At most, considered as a whole, the empirical research simply illustrates what this Court held in *Apodaca*: States may reasonably differ on the value of requiring unanimity. In sum, petitioner offers scant basis for this Court to revisit and overturn decades-old precedent. This Court should decline the invitation.

REASONS FOR DENYING THE PETITION

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

U.S. Const. amend. VI. In *Apodaca,* this Court specifically upheld Oregon's state constitutional practice that allows juries to decide cases by 10-2 or 11-1 votes as well as unanimously. 406 U.S. 404.

A. *Stare decisis* requires that petitioner provide a compelling justification for overruling *Apodaca*.

This Court often has stressed the importance of *stare decisis,* stating that "the doctrine * * * is of fundamental importance to the rule of law" and that, accordingly, "'any departure from the doctrine * * * demands special justification.'" *Welch v. Dep't. of Highways & Pub. Transp.,* 483 U.S. 468, 494-95 (1987), (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). *See also Akron v. Akron Center for Reproductive Health, Inc.,* 462

U.S. 416- 419-20 (1983) (doctrine of *stare decisis* "demands respect in a society governed by the rule of law.").

The Court has set the bar very high for overruling its prior decisions: "Adherence to precedent promotes stability, predictability, and respect for judicial authority. For all of these reasons, *we will not depart from the doctrine of stare decisis without some compelling justification.*" *Hilton v. S. C. Pub. Rys. Comm'n,* 502 U.S. 197, 202 (1991) (emphasis added; internal citations omitted).

Among the "factors in deciding whether to adhere to the principle of *stare decisis*" are "the antiquity of the precedent," and "the reliance interests at stake[.]" *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) (No. 07-1529). As noted, *Apodaca* is thirty-seven years old, and Oregon has relied on it since 1972 to instruct jurors in felony trials that they need not return unanimous verdicts.

"Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weigh in favor of reconsideration." *Pearson v. Callahan*, 129 S. Ct. 808, 829-30 (2009) (No. 07-751), (quoting *Payne v. Tennessee*, 501 U.S. 808, 829-30 (1991). The decision in *Apodaca* is unambiguous and easy to apply. Members

of this Court have not questioned *Apodaca* in subsequent decisions; on the contrary, this Court repeatedly has reiterated that decision's holding without expressing any reservation. *Schad v. Arizona*, 501 U.S. 624, 634 n. 5 (1991) ("a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict."); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979) (Court "conclude[d] in 1972 that a jury's verdict need not be unanimous to satisfy constitutional requirements"); *McKoy v. North Carolina*, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) (noting that the Court has "approved verdicts by less than a unanimous jury," (citing *Apodaca*)); *Brown v. Louisiana*, 447 U.S. 323, 330-31 (1980) (Court has held that "the constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict," citing *Apodaca*).

Because of the respect that *stare decisis* demands, because *Apodaca* has been settled law for thirty-seven years, and because this Court subsequently has not questioned that decision but instead has cited its holding without reservation, this Court should consider overruling it only if petitioner can provide a "compelling justification" for doing so. *Hilton*, 502 U.S. at 202. He has not done so, and this Court should not grant certiorari.

B. *Apodaca* is not inconsistent with *Blakely* or *Apprendi*.

In urging this Court to overrule *Apodaca*, petitioner relies heavily on this Court's recent decisions in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which he claims are flatly inconsistent with *Apodaca*. Petitioner relies especially on the statement in *Blakely* that the Sixth Amendment requires "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" (Pet. Cert. App. 6a, (quoting *Blakely*, 542 U.S. at 301 (in turn quoting Blackstone, *supra*, at 343) (emphasis added in Pet. Cert.). Apparently, petitioner believes that, when the Court quoted Blackstone in its discussion of when the Sixth Amendment requires factual findings to be made by a jury rather than the court, this Court also intended to interpret the Sixth Amendment to require unanimous jury verdicts in state criminal cases.

But neither *Blakely* nor *Apprendi* dealt with the issue of whether the Sixth Amendment requires unanimous jury verdicts. The issue in *Blakely* and *Apprendi* was whether basing an enhanced sentence on fact-finding by the trial court violated the petitioner's Sixth Amendment right to trial by jury. 542 U.S. at 298; 530 U.S. at 468-69). Thus, when the Court in *Blakely* referred to the "long standing tenet" that the "truth of every

accusation" against a defendant should be "confirmed by the unanimous suffrage of twelve of his equals and neighbours," 542 U.S. at 301 (quoting Blackstone), it did so in a strikingly different context, involving issues quite different than the one presented here. *Apodaca* simply is not "squarely inconsistent" with *Blakely* and *Apprendi*.[2]

---

[2] Petitioner also relies on other decisions from this Court that, according to him, have "held or assumed * * * that the Sixth Amendment require[s] unanimity for a criminal conviction." (Pet. Cert. 9) (citations omitted). Those decisions offer little support for petitioner's cause. In *Maxwell v. Dow*, 176 U.S. 581 (1900), and *Patton v. United States*, 281 U.S. 276 (1930), the discussions of jury unanimity were *dicta*. The issue in *Maxwell* was whether an eight-person jury was constitutionally permissible in state criminal trials. 176 U.S. at 582. In *Patton*, the issue was whether the criminal defendant could agree to an 11-person jury. 281 U.S. at 286. *Thompson v. Utah*, 170 U.S. 343, 352 (1898), cited by petitioner, also involved an eight-person jury. *Andres v. United States*, 333 U.S. 740 (1948), involved a prosecution for a crime committed on federal property. In that case, the Court concluded, rather summarily, that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply," citing only *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897). *Andres*, 333 U.S. at 748 & n. 13. In *American Pub. Co.*, which dealt with the right to jury trial under the Seventh Amendment, the Court specifically noted that "the power of a state

C. Petitioner's historical arguments provide no persuasive reason for this Court to revisit the result in *Apodaca*.

Petitioner also relies on history, asserting that it has been "'settled' since 'the latter half of the 14th century * * * that a verdict had to be unanimous' to convict someone of a crime and that this requirement 'had become an accepted feature of the common-law jury by the 18th century.'" (Pet. Cert. 9, (quoting *Apodaca*, 406 U.S. at 407-08 & n. 2).) The Court accepted that reading of history in *Apodaca*. That does not, however, equate to petitioner's suggestion that, if a feature of the common-law jury was settled at the time the Bill of Rights was adopted, it must have been incorporated in the Sixth Amendment.

This Court clearly has rejected petitioner's approach, because it has held that not all features of the common-law jury are included in and guaranteed by the Sixth Amendment. Notably, although the 12-person jury also was an accepted feature of the common-law jury at the time of the Founding—and although Blackstone mentions that numerical common-law requirement in the

---

to change the rule in respect to unanimity of juries is not before us for consideration." 166 U.S. at 468 (citations omitted). When that issue came before the Court in *Apodaca*, the Court ruled that unanimity is not required under the Sixth Amendment.

same sentence from his Commentaries that petitioner relies on and that this Court quoted in *Blakely* and *Apprendi*—this Court has held that the Sixth Amendment does not require 12-person juries. *Williams v. Florida*, 399 U.S. 78, 86 (1970).

The Court reviewed the relevant constitutional history in detail in *Williams*, 399 U.S. at 94-99, and summarized it in *Apodaca*, 406 U.S. at 409. The history underlying the Sixth Amendment "casts considerable doubt on the easy assumption that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution" *Williams*, 399 U.S. at 92-93. Instead, although the historical record can lead to competing conclusions, the stronger inference is that one of the features of the common-law jury that the Framers did not intend to include in the Sixth Amendment was the requirement of a unanimous jury verdict.

In *Apodaca*, this Court summarized the history of the Sixth Amendment. The Court concluded that "[t]he *most salient fact* in the scanty history of the Sixth Amendment" is that, although "as it was introduced * * *, the proposed Amendment provided for trial 'by an impartial jury of the freeholders of the vicinage, *with the requisite of unanimity for conviction* * * * and other accustomed requisites," ultimately the unanimity and "accustomed requisites" provi-

sions were not included. 406 U. S. at 409 (emphases added; citation omitted). Indeed, the conference committee "refused to accept not only the original * * * language but also an alternate suggestion * * * that juries be defined as possessing 'the accustomed requisites.'" *Id.* (citation omitted).

This Court noted in *Apodaca* that, as it had "observed in *Williams*, one can draw conflicting inferences from this legislative history." 406 U. S. at 409.

> One possible inference is that Congress eliminated references to unanimity and to the other "accustomed requisites" of the jury because those requisites were thought already to be implicit in the very concept of jury. *A contrary explanation, which we found in Williams to be the more plausible, is that the deletion was intended to have some substantive effect.*

Id. at 409-10, (citing *Williams*, 399 U. S. at 96-97 (emphasis added)).[3]

---

[3] *Amici* Charles Hamilton Institute for Race and Justice, et al., accuse the *Apodaca* plurality of having ignored and "broke[n] [with] literally centuries of well-settled common law precedent requiring unanimous criminal verdicts[.]" (CHHIRJ Br. 5). It is more

Thus, far from the history of the Sixth Amendment supporting petitioner's claim that the provision includes a right to a unanimous jury verdict in state criminal trials, this Court has concluded that the "more plausible" explanation for the fact that the Amendment does not explicitly include such a right is that the deletion "was intended to have some substantive effect." Petitioner would have the Court overlook and override that intended effect.

In *Apodaca,* this Court also reviewed the reasons why the unanimous jury verdict had become a settled feature of the common law. As this Court observed in *Williams*, 399 U.S. at 89—with regard to the requirement of a 12-person jury—the requirement of a unanimous jury verdict appears to have been a "historical accident" that had its origins in outmoded medieval concepts.

This Court has identified "[a]t least four [possible] explanations * * * for the development of unanimity" at common law. *Apodaca*, 406 U. S. at 407 n. 2. All of them are either outmoded or historical accidents. The first explanation is that

---

accurate to say that *Apodaca* reviewed that history, but found that it did not lead to the conclusion that any such common-law right is included in the Sixth Amendment. *Amici* and petitioner ask this Court to plow ground that the Court has already been over in detail.

"unanimity developed to compensate for the lack of other rules insuring that a defendant received a fair trial." *Id.* (citations omitted). The "second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique * * * was abandoned, the requirement that one side obtain the votes of all 12 jurors remained." *Id.* (citations omitted). "A third possibility is that unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case," and that "the medieval mind assumed that there could be only one correct view of the facts[.]" Therefore, if some or all of the jurors "declared the facts erroneously, they might be punished for perjury." *Id.* (citations omitted). "The final explanation is that jury unanimity arose out of the medieval concept of consent." *Id.* To the medieval mind, the concept of consent "carried with it the idea of * * * unanimity[.]" *Id.* (internal quotation marks and citation omitted). Even in 18th century America, there was "a similar concern that decisions binding on the community be taken unanimously." *Id.* (citation omitted).

Those historical reasons for the common-law requirement of a unanimous jury verdict have little, if any, force now. Instead, "[m]any of the possible reasons for the unanimity requirement are ones that are substantially less persuasive now—and the Court itself has recognized this." Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 Hastings Const. L. Q. 141, 143 (2006). "If unanimity developed at common law 'to compensate for the lack of other rules insuring that a defendant received a fair trial, American criminal procedure now has many more substantial protections for defendants." Leib, *supra*, at 143 (quoting *Apodaca*, 406 U. S. at 407 n. 2). If unanimity "arose out of the practice in the ancient mode of trial by compurgation"—a mode of trial where certain kinds of witnesses essentially became jurors—that practice "has very little relevance to contemporary trials, where we'd never allow a witness on the jury[.]" Leib, *supra*, at 143. "[W]e should have no allegiance to a decision rule that arose out of a jury practice that has so little to do with our own." *Id.* "If the unanimity requirement arose out of the medieval idea that reasonable people cannot disagree and that minority jurors must be lying, we must certainly abandon it in our pluralistic society." *Id.* (citations omitted throughout). Given the outdated rationales for the common-law requirement of unanimity, reading it into the Sixth Amendment

would be to "ascribe a blind formalism to the Framers[.]" *Williams,* 399 U.S. at 103.

Thus, neither the history of the Sixth Amendment nor the reasons for the common-law requirement of jury unanimity provide any "compelling justification," *Hilton*, 502 U.S. at 202, to disregard principles of *stare decisis* and overrule *Apodaca*. Instead, as this Court has recognized, *Apodaca*'s treatment of history parallels the Court's treatment of history in *Williams*. *Burch*, 441 U.S. at 136 (noting that "[a] similar analysis" to that in *Williams* led the Court in *Apodaca* to conclude "that a jury's verdict need not be unanimous to satisfy constitutional requirements, even though unanimity had been the rule at common law"); *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976) (a "[s]imilar analysis [to that in *Williams*] led to the holding in *Apodaca* that the jury's verdict need not be unanimous").

D. Recent empirical research is not relevant to whether this Court should revisit *Apodaca* and, in all events, provides no persuasive support for petitioner's claim.

Turning from history, petitioner contends (Pet. 22) that recent empirical research comparing the experiences of unanimous and non-unanimous juries "confirms the wisdom of the historical unanimity requirement" and demonstrates that this Court's decision in *Apodaca*

cannot stand. Yet, as discussed above, before this Court revisits *Apodaca*, petitioner must offer more than a suggestion that jury unanimity may be "wiser" than non-unanimous juries. As this Court has recognized, "no judicial system could do society's work if it eyed each issue afresh in every case that raised it." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), (citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921)). Instead, when this Court re-examines a prior holding, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law[.]" *Id.* at 854-55.

Recent empirical research demonstrating that a state's decision to permit non-unanimous juries may affect the dynamics of jury deliberations provides no basis to revisit long-standing precedent. The question here—as it was in *Apodaca*—is whether the Sixth Amendment prohibits non-unanimous juries; nothing about that constitutional question has changed in the 37 years since this Court decided *Apodaca*. That petitioner can point to some studies suggesting that states *should not* permit non-unanimous juries reasons says nothing about whether the states *cannot* permit non-unanimous juries. States remain free to make policy choices so long as those choices do

not infringe upon constitutional protections and liberties. *Casey*, 505 U.S. at 849. In all events, nothing since *Apodaca*—empirically or experientially—has demonstrated that this Court's decision in *Apodaca* is unworkable or unsound, or suggests that *Apodaca* was based on a fundamentally mistaken, or subsequently discredited, view of jury dynamics.

Petitioner relies (Pet. 23) on conclusions from various studies that jurors who are not required to achieve unanimity evaluate the evidence less thoroughly, spend less time deliberating, and take fewer ballots. In petitioner's view, that evidence undermines this Court's conclusion in *Apodaca* that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. But studies show that little disparity actually exists in the duration of deliberations and—even more critically—that to the extent that there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict.

The "most comprehensive jury study" conducted in the past thirty years has shown a "minimal disparity" between the amount of time that juries spend deliberating when unanimity is required and the amount of time they spend when unanimity is not required. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 488 (1966);

Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 Fla. St U. L. Rev. 659, 672 (1997). That same study also demonstrates that in nine out of ten cases, the result of the first ballot is the same as the verdict. *Id.*; *see also* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 690 (2001). Thus, to the extent that there is any disparity in the length of deliberation, that time is often spent trying to convince one or two holdouts. And in jurisdictions that require jury unanimity, those holdout jurors often simply succumb to the "pressure for unanimous agreement[.]" Leib, *supra*, at 144-45. Thus, contrary to petitioner's assumptions, a jury unanimity requirement does not necessarily guarantee or promote "open-minded debate" in an ideally deliberative environment; rather, the time spent attempting to achieve unanimity is often spent pressuring and cajoling the few holdouts into acquiescence.

Of greater significance, however, is that the degree and nature of the deliberations is not directly proportional to the accuracy of any verdict. Most experts agree that the accuracy of the ultimate verdict is not contingent upon the whether jury unanimity is required. *See* Leib, *supra*, at 144 ("most agree that the outcomes of verdicts do not significantly vary" depending upon whether

there exists a unanimity rule or not). Permitting juries to reach non-unanimous verdicts, therefore, does not undermine the ultimate purposes of the jury: to safeguard a defendant against the corrupt or overzealous prosecutor and the biased judge, and to assure a fair and equitable resolution of factual issues. *Apodaca*, 406 U.S. at 410; *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498 (1931).

Petitioner further contends (Pet. 25) that allowing non-unanimous jury verdicts marginalizes jurors who are members of minority groups. Petitioner again relies on empirical research that, in his view, demonstrates that the non-unanimous jury scheme in effect silences dissenting and minority voices. But unanimity cannot guarantee mutual tolerance. Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169 (1995). That is, unanimity simply does not guarantee that juries will tolerate opposing or minority views or listen to reason and consider the evidence. In reality, whether the minority is likely to speak up or not depends more upon the different personalities of the jurors. Glasser, *supra*, at 674. In fact, it is at least equally likely that the non-unanimous jury system actually encourages the minority to speak up, because they need to convince fewer other jurors to come to their side. *Id.*

In sum, to support overruling a constitutional decision that Oregon has been relying upon for 37 years, petitioner must provide something more compelling than some recent analyses of jury behavior. That is particularly true when the evidence petitioner relies upon presents an incomplete picture of how the non-unanimity requirement affects jury deliberations. Wiser or not, unanimous juries are not a Sixth Amendment mandate. This Court thus need not reconsider the system that Oregon's Constitution requires it to follow and that this Court has already upheld.

CONCLUSION

Petitioner asserts that "[t]wo states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so." (Pet. Cert. 30.) That accusation is unfounded. It is more accurate to say that those states have relied on this Court's decades-old case law in permitting juries in most felony cases to return less-than-unanimous verdicts. Petitioner asks this Court to grant his petition and reconsider *Apodaca* based on quotations from *Blakely* and *Apprendi* that are taken out of context, history that this Court has already does not support petitioner's argument, and empirical research that does not yield any clear conclusion that unanimous jury verdicts are necessarily preferable, let alone constitutionally required. As it did twice in

2008, note 1, *supra*, this Court should decline the invitation and deny the petition.

Respectfully submitted,

JOHN R. KROGER
Attorney General of Oregon
MARY H. WILLIAMS
Deputy Attorney General
JEROME LIDZ
Solicitor General
JANET A. METCALF
ANNA M. JOYCE
Assistant Attorneys General
Counsel for Respondent
State of Oregon

June 29, 2009